

STATE OF VERMONT
COMMISSIONER OF TAXES

IN RE: [Taxpayer]
Meals and Rooms Tax; Sales and Use Tax
ATC #15-01

DETERMINATION

Introduction

A hearing was held [Date], on the taxpayer's appeal of the Department's audit assessment of meals and rooms tax and sales and use tax. [Deleted]

Findings of Fact

1. [Taxpayer], is [an inn] in [town]. The Department audited Taxpayer for an audit period of [month, year] through [month, year]. [Deleted]

2. The auditor made site visits, and Taxpayer also sent his books and records electronically to the Department for review during the audit.

3. The Department sent Taxpayer an assessment notice on [date]. The assessment included eight meals and rooms tax ("MR") issues, and three sales and use tax ("SU") issues. State's Exhibit ("Ex.") A. The total MR assessment was for [\$] tax, and the total SU assessment was for [\$], plus interest and penalties. Id. The tax, interest and penalties shown on the Tax Examination Changes Report in Exhibit A are detailed in the Schedule of Items Assessed. State's Ex. B. Taxpayer timely appealed the assessment on [date].

4. Taxpayer did not collect and remit rooms tax on the "resort fees" which Taxpayer retained, and which were part of the charge for every room (MR Issue 1, [\$] tax). Taxpayer did not collect and remit rooms tax on forfeited rooms deposits (MR2, [\$] tax). Taxpayer erroneously exempted one room charge when the occupant was a government employee, but the room was

paid by the individual and not by the government (MR3, [\$] tax). Taxpayer did not collect and remit rooms tax on late checkout fees, welcome baskets, and various other items (MR7, [\$] tax). The Department also collects a town's "local option" meals and rooms tax [Deleted]. State's Ex. A.

5. Taxpayer did not collect and remit sales tax on a few of its retail sales (SU8, [\$] tax); and did not pay use tax on certain items it purchased without sales tax and gave as gifts or used in its business (SU4, 5, [\$] tax). Id.

6. The State's Exhibits were admitted with no objection.

7. [Taxpayer owner], majority owner of Taxpayer company, raised specific questions regarding several line items in the Schedule of Items Assessed, and was satisfied with the Department witness's answers. He questioned Record (Line Items) 367 and 368, which were Taxpayer's purchase of computer images (photographs) for its Website. When he explained that these were received as part of advertising services, the Department's witness agreed that these should not have been taxed, and agreed to strike those two items from the assessment, including the related penalty and interest. [Taxpayer owner] also questioned Record (Line Item) #241, a "resort fee" line, showing a taxable base amount of [\$]. [Taxpayer owner] questioned this amount and believed it should be [\$], but stated he was unable to substantiate the lower taxable base number.

Discussion and Conclusions of Law

Rooms tax is imposed on the "rent" charged for an "occupancy" in a "hotel." 32 V.S.A. §§ 9201(3, (6), (8); 9241(a). The operator of the hotel must collect the tax from the occupant, and if he fails to do so, the operator is liable for the tax. 32 V.S.A. § 9242(a), (c).

Sales tax is imposed on the retail sale of tangible personal property. 32 V.S.A. § 9771(1). A business may purchase items without paying any sales tax on those items, if they are purchased for resale to the business's retail customers, who will pay sales tax on those transactions. 32 V.S.A. § 9701(5). If, however, a business purchases items and pays no sales tax on them, and then does not resell them, but instead gives them to its customers, the business has "used" the items in Vermont and owes a use tax on them. 32 V.S.A. § 9701(13); 9773(1). If a business sells an item at retail and does not collect the sales tax from the customer, the business is liable for payment of the tax. 32 V.S.A. § 9703(a).

Resort fees - rooms tax

"Rent" is defined as "the consideration received for occupancy" of the room. 32 V.S.A. § 9201(8). The meals and rooms tax regulations provide that an extra charge for anything "intrinsic to the occupancy" is considered rent and subject to rooms tax. Department of Taxes Meals and Rooms Regulations, 3/01/2010, ("Reg.") § 1.9202(8)-1. Because the resort fees were charged to every guest, they were in essence a part of the general charge for the room, and "intrinsic to" the room rental. The resorts fees are therefore subject to the rooms tax, to the extent retained by Taxpayer. There was testimony that a portion of each resort fee was not retained by Taxpayer, but was paid by Taxpayer to its employees, and this portion was properly treated by the Department as not subject to the rooms tax. Reg. § 1.9202(8)-2.

Taxpayer questioned the base amount of one resort fee item, [\$], which the Department used to calculate the assessment, suggesting it should be approximately [\$] less (a reduction of the rooms tax assessment by approximately [\$]), but stated that he was unable to substantiate the lower number. Once the Department issued its [year] assessment notice based on the taxpayer's records, the Department had established its prima facie case. Masini

v. Department of Revenue of the State of Illinois, 60 Ill.App.3d 11, 15; 376 N.E.2d 324, 329 (1978, App. Ct. of Ill.). At that point, the burden shifted to the taxpayer to produce competent evidence to show that the Department's assessment was incorrect. Id. Taxpayer did not present or submit any documentation to show that the Department's resort fee line item was incorrect, and as noted, said that he could not substantiate the lower number. "A bare challenge . . . unaccompanied . . . by any competent evidence . . . is insufficient to overcome the Department's prima facie case." Id. The Department is "not required to offer [the taxpayer's] books and records into evidence;" it is the taxpayer's burden to produce the records to overcome the Department's prima facie case. Id.

Miscellaneous charges - rooms tax

Taxpayer did not collect tax on several late checkout fees, welcome baskets, and other charges connected to room rentals. The Department assessed Taxpayer [\$] tax on these items as part of the consideration received for occupancy.

Forfeited deposits - rooms tax

Taxpayer retained room deposits which had been forfeited. A forfeited deposit which is retained by the innkeeper is subject to rooms tax. Reg. §1.9202(8)-4 Rent – Forfeited Deposits on Rooms.

Rental to government employee - rooms tax

There is no rooms tax exemption for government employees *per se*. While the State may be barred from taxing another state government or the Federal government if it pays the rental for a room, if the room is paid for by the individual, that rental is subject to the rooms tax, regardless of whether the individual is a government employee or is travelling on government business. Because Taxpayer did not collect rooms tax on the occupancy paid by an individual who was a

government employee, the Department properly assessed Taxpayer for that tax under the provisions of Section 9242(c).

Items on which no sales tax paid - sales and use tax

Taxpayer acquired a number of items and paid no sales tax on its purchases. Of these items, Taxpayer gave away items such as beer mugs and towels, and sold several items, such as coffee mugs and postcards, without collecting sales tax. For all of these items, Taxpayer was liable for use tax.

The Department also assessed Taxpayer use tax for charges it paid for computer images of the Inn. At the hearing, Taxpayer questioned whether it should be liable for use tax on these computer images, which it uploaded to its Web site for advertising the Inn. Taxpayer had purchased advertising services, and the computer images were provided as part of those services. The sales tax law does not apply to most services. 32 V.S.A. § 9771. Section 9741(36) specifically exempts charges by an advertising agency for “advertising materials” if the materials are provided as part of the delivery of the advertising services. The Department agreed that these computer images (photographs) could be treated as part of the delivery of advertising services, and reduced the assessment by these two amounts, plus the related penalty and interest.

Conclusion

For these reasons, the Department’s assessment is affirmed, except the assessment amounts for Line Items 367 and 368, the computer images obtained as part of advertising services, are reversed, as well as the related penalty and interest.

Dated this day of , 2016, at Montpelier, County of Washington, State of Vermont.

State of Vermont
Department of Taxes

Emily J. Bergquist
Hearing Officer

APPROVED BY:

Mary N. Peterson
Commissioner of Taxes

Date: _____

GENERAL PROVISIONS

Other taxpayers may refer to this Determination, when redacted to protect confidentiality, to see the Department's general approach, but the Department will not be bound by this Determination in the case of any other taxpayer or in the case of any change in the relevant statutes or regulations.

This Determination may be made public after deletion of the parties' names and any information which may identify the parties. A copy of this Determination showing the proposed deletions is attached, and you may request within 30 days that the Commissioner delete any further information that might identify the parties. The final discretion as to deletions rests with the Commissioner.